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No. 00-454

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, MENOMINEE INDIAN TRIBE OF WISCONSIN, PUEBLO OF POJOAQUE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, MANZANITA BAND OF MISSION INDIANS, AND SEMINOLE TRIBE OF FLORIDA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indian tribe has sovereign authority to impose a tax on nonmember activities and transactions taking place on fee lands within the borders of the tribe's reservation where the tax does not regulate the nonmember's conduct but is imposed to raise revenue to support tribal governmental services.

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INTEREST OF AMICI CURIAE

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribes) are federally recognized Indian tribes.[1] The Umatilla Reservation, some 172,000 acres, is located in Oregon. Approximately two-thirds of the Umatilla Tribes' 2,262 members live on or near the Reservation, along with approximately 1,000 members of other tribes and 1,700 non-Indians. The Taxation Code of the Umatilla Tribes includes a "Transient Lodging Tax" similar to the Navajo Nation's Hotel Occupancy Tax, which is at issue before the Court. In addition, the Taxation Code includes a "Utility Tax" that applies to non-Indian businesses operating within the exterior boundaries of the Umatilla Reservation. The revenue raised through these taxes supports essential government services provided by the Umatilla Tribes, including police and fire protection and emergency response services.

Amicus Three Affiliated Tribes of the Fort Berthold Reservation (Three Affiliated Tribes) are federally-recognized Indian tribes residing on the Fort Berthold Indian Reservation in North Dakota. The Fort Berthold Reservation contains land held in trust for the Three Affiliated Tribes and their members, as well as lands owned in fee by non-members. *See New Town v. United States*, 454 F.2d 121, 127 (8th Cir. 1972). Through its Tribal Tax Code, the Three Affiliated Tribes imposes a "possessory interest tax" on certain real and personal property within the Reservation, and

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and a joint letter evidencing their consent is on file with the Office of the Clerk of this Court.

an oil and gas gross production tax.[2] These taxes are imposed to raise revenue for the promotion of the health, security, economic and general welfare of both members and non-members residing or doing business on the Reservation, for government operations, for the delivery of services on the Reservation, and for the development of the Reservation economy.

Amicus Menominee Indian Tribe of Wisconsin (Menominee Tribe) is a federally recognized tribe located in northeastern Wisconsin. The Menominee Tribe's reservation, established on May 12, 1854 in the Treaty of 1854, 10 Stat. 1064, and recognized by statute, 25 U.S.C. § 903d(b), comprises some 325,000 acres of land. Approximately 10-15% of that land consists of fee land held by non-Indians. The Menominee Tribe imposes a "hotel room tax" like the Navajo Hotel Occupancy Tax at issue in this case, and a use tax on construction materials brought onto the reservation. Revenues generated by these taxes are used to support tribal programs and services.

Amicus Pueblo of Pojoaque (Pueblo) is a federally-recognized Indian tribe residing on its Pueblo in New Mexico. Like other pueblos in New Mexico, the Pueblo derives its title from Spanish grants, and holds its lands in fee simple. The Pueblo's lands are therefore not a "reservation," though they do constitute "Indian country" over which the Pueblo has jurisdiction. *See United States v. Sandoval*, 231 U.S. 28 (1913); 18 U.S.C. § 1151(b). There are some 13,500 acres within the exterior boundaries of the Pueblo. Of these, approximately 2,800 acres are held in fee by nonmembers; the remainder is held in fee simple by the Pueblo, subject to a restraint on alienation imposed by 25 U.S.C. § 177. In addition, the Pueblo is the beneficial owner of two parcels

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[2] Portions of the Three Affiliated Tribes' Tax Code are included in the record at 138a.

totaling some 237 acres that are held in trust by the United States for the Pueblo. The Pueblo imposes several taxes, including a "lodgers tax" like the hotel occupancy tax at issue in this case, a gross receipts tax, an *ad valorem* tax on the property of utility companies (including rights-of-way over the Pueblo's lands), and cigarette and gasoline taxes. Receipts from the taxes collected are paid into the Pueblo's general fund, and are used for the provision of tribal services and programs.

Amicus Salt River Pima-Maricopa Indian Community ("SRPMIC" or "Community") is a federally-recognized Indian tribe residing on a reservation in Arizona. Of the approximately 52,000 acres that comprise the Reservation, a small portion is owned in fee by members and non-members. About one-half of this fee land is situated along a commercial corridor. There is significant commercial development within the Community that may be owned and managed by the Community itself, a Community member or a fee land owner. There are also non-member lessees of tribally or individually owned trust lands. Commercial development is expected to grow considerably in the future.

The SRPMIC imposes various taxes such as possessory interest, business privilege (sales), tobacco and utility taxes on commercial businesses to raise revenues to support essential services provided by the Community. These services include but are not limited to police and fire protection, emergency response services, public health inspections building code enforcement, health and safety enforcement, and public transportation. These services are provided to member and non-members alike, and to business and residences. The State and local governments provide next to no governmental services within the boundaries of the Salt River Pima-Maricopa Indian Community Reservation. If the gas station on fee land is robbed, if there is a fire at the convenience store on leased Community-owned trust land, or

if someone has a heart attack at a restaurant at the Pavilions shopping center on leased member-owned trust land, it is the Community that will provide assistance through its governmental services. Additionally, in order to support further economic development, the Community needs revenue sources to help fund the construction of infrastructure such as water, sewers and roads. For the above-described and other governmental purposes, all of which respond to the health, safety and welfare needs of individuals regardless of whether they are members or non-members, the Community must continue to raise revenues through taxes.

Amicus Seminole Tribe of Florida (Seminole Tribe) is a federally recognized tribe with approximately 85,285 acres of trust land existing within six counties in Florida, including the following reservations: the Hollywood Reservation in Broward County (497 acres); the Big Cypress Reservation in Hendry and Broward Counties (52,338 acres); the Brighton Reservation in Glades County (35,805 acres); the Immokalee Reservation in Collier County (600 acres); and the Tampa Reservation in Hillsborough County (39 acres). The Seminole Tribe does not have any fee land within these reservations, but does have land outside of the reservations over which it exercises tribal authority. The Seminole Tribe imposes a tax on cigarettes sold at retail outlets on tribal lands. Revenues from the taxes collected are used for tribal services.

Amicus Manzanita Band of Mission Indians (Manzanita Band) is a federally recognized tribe located in San Diego County in the western Carrizo Desert in Southern California. The Manzanita Band's reservation, established by the Act of January 11, 1891, 26 Stat. 712-714, encompasses some 3,600 acres, of which 140 acres are held in fee by non-Indians. Though the Manzanita Band has not yet imposed any taxation on the fee lands or activities taking place on such lands within its borders, it reserves its power to tax or regulate on such lands.

The Court's decision in this case could have a significant impact on the current tax systems of *amici* tribes, and could jeopardize an important source of tribal revenue for those tribes. Loss of such revenues would lead to a decrease in services provided by the tribes. In addition, all of the *amici* tribes—including those that do not now tax the activities of non-members on non-members' fee lands—have an interest in maintaining their powers to tax such activities in the future in order to raise revenues for tribal services, and in the broadest interpretation of tribal powers over non-Indians and limited exclusions from those powers.

SUMMARY OF ARGUMENT

Tribal authority to tax non-Indians has long been recognized by the United States Supreme Court. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld the Jicarilla Apache Tribe's right to impose a severance tax on non-Indian oil and gas production. The taxable activity took place on trust land but pursuant to leases that granted the lessees the exclusive and perpetual right to extract oil and gas from the property. The lessees argued that the tribe had ceded its power to exclude them from the property when it entered into the leases and that it therefore lacked the power to impose the tax. The Court rejected the assertion that a tribe's authority to tax non-Indians who do business on the reservation stems exclusively from its power to exclude. Instead, the Court held that the Tribe's authority to tax derives from its power to govern and to pay for the costs of self-government. *Id.* at 143–44. The Court cited several landmark non-Indian tax cases that outline the "general principles of taxation" under which governmental entities, like tribes, may exercise their power to tax. *Id.* at 137–38, 140.

Montana v. United States, 450 U.S. 544 (1981), decided less than a year before *Merrion*, and the case relied on by the Tenth Circuit Court of Appeals and the Petitioner in this case,

dealt with the validity of legislation enacted by the Crow Tribe preventing non-members from hunting and fishing on its reservation, including that part of the reservation owned in fee simple by non-members. The Court found that the Tribe had lost the right to absolute use and occupation of lands that had been conveyed in fee to non-members and therefore as a general rule no longer possessed the incidental power to *regulate* the use of the lands by non-Indians. The Court acknowledged, however, that "Indian tribes retain sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. In particular, the Court noted that a tribe "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members" and may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

Montana is not a tax case; it is a case delineating regulatory authority. The context of the Court's reference to taxation in *Montana* is in connection with a tribe's attempt to "regulate . . . the activities of nonmembers . . . ." *Id.* at 565. Taxation can indeed be regulatory in nature. However, in its more common form, it is simply a means of raising revenue to pay for the cost of government and is not intended to circumscribe the activities or conduct of taxpayers. The Court has long recognized the distinction between *regulatory* taxation and *revenue-raising* taxation, each of which is subject to different standards and analysis. It made just such a distinction in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), which involved tribal taxation and was handed down only ten months prior to *Montana*. The Court recently reaffirmed this distinction in a non-tribal context in *Jefferson County v. Acker*, 527 U.S. 423 (1999). This distinction is a critical one.

Unlike tribal *regulatory* power, which is derived in large part from the power to exclude non-Indians from the reservation, a tribe's revenue raising power of taxation is derived from its sovereign power to govern and the concomitant authority to raise revenues to pay for the costs of government. In sum, the power of a tribe to tax non-Indian activity is analyzed under *Merrion*, not *Montana*, and the exercise of that power is not dependent on whether the activity occurs on trust land, fee land, or fee-equivalent land.

The Tenth Circuit reached the correct result but employed the wrong analysis. The court should have upheld the application of the Navajo Tribe's Hotel Occupancy Tax, 24 Navajo Tribal Code §§ 101-142, to hotel guests on fee lands within the reservation boundaries under *Merrion*. There was no need to determine whether the hotel guests had entered into "consensual relations" with the Navajo Tribe sufficient to uphold tribal regulation under *Montana*. To the extent that the *Montana* analysis applies to taxes at all, it is limited in application to *regulatory* taxation. *Montana* has no applicability to the Navajo Hotel Occupancy Tax, which has only a revenue raising purpose. This court should affirm the judgment of the lower courts, but should do so on the basis that the Navajo Tribe has the power under *Merrion* to tax hotel guests on fee lands to raise revenues for tribal services.

ARGUMENT

I. *MERRION* PROVIDES THE ANALYTIC FRAMEWORK FOR DETERMINING THE VALIDITY OF NON-REGULATORY TRIBAL TAXATION OF NON-MEMBERS

A. A Tribe's Power To Tax Derives From Its Power To Govern And Raise Revenues—Not From Its Power To Exclude

In *Merrion v. Jicarilla Apache Tribe*, the Court upheld the Jicarilla Apache's right to impose a severance tax on non-Indian oil and gas production on the reservation. 455 U.S.

130 (1982). The activity on which the tax was levied took place on trust land, but pursuant to leases giving the lessees exclusive right to extract oil and gas on the property for so long as they continued to conduct that activity. The lessees argued that while the activity took place on trust land, the tribe lacked authority to impose the tax because it had ceded its power to exclude them when it entered into the leases. The Court rejected the assertion that an Indian tribe's authority to tax non-Indians who do business on the reservation stems exclusively from its power to exclude such persons from tribal land:

> We disagree with the premise that the power to tax derives only from the power to exclude . . . . The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands.

Id. at 137.

The Court rejected the notion that earlier decisions upholding tribal power to tax non-members limited the exercise of that power to a tribe's power to exclude:

> [T]he decision in *Buster v. Wright* [3] actually undermines the theory that the tribes' taxing authority derives

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[3] *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). In *Buster*, the Court of Appeals focused on tribal sovereign authority as the source of the Creek Nation's powers of taxation within its borders regardless of the underlying form of land ownership. *Id.* at 951-52. The right to exclude was irrelevant to the holding in *Buster* because the Creek Nation had lost the ability to require the non-member taxpayers to leave the reservation if they failed to pay the taxes. *See id.* at 954. This Court has cited *Buster* to illustrate that a tribe may legitimately exercise its inherent sovereign authority to tax non-members even on non-Indian fee land within the reservation. *Merrion*, 455 U.S. at 143-44; *Washington v. Confederated Tribes of the Colville Indian Reservation*,

> solely from the power to exclude non-Indians from tribal lands . . . . Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[neither] the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners*." This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

Id. at 143-44 (quoting *Buster*, 135 F. at 952).

The *Merrion* Court continued:

> We choose not to embrace a new *restriction* on the extent of the tribal authority to tax . . . . Instead, based on the views of each of the federal branches, *general principles of taxation*, and the conception of Indian tribes as domestic, dependent nations, we conclude that the Tribe has the authority to impose a severance tax on the mining activities of petitioners as part of its power to govern and to pay for the costs of self-government.

Id. at 144 (emphasis added).

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447 U.S. 134, 153 (1980). *See also Montana*, 450 U.S. at 566; *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). Furthermore, *Buster* cannot be legitimately distinguished from *Atkinson* on a factual basis as Petitioner has argued at page 29 of its brief. *See* Pet. App. 20a-24a (noting that the relevant factual connection between *Buster* and *Atkinson* is the non-member being situated on fee land within the boundaries of a tribe's reservation and finding other factual distinctions irrelevant); *Buster*, 135 F. at 950 (stating that tribal powers to tax do not emanate from a treaty or federal statute, but stem from inherent sovereign authority).

Thus, either a tribe's power to exclude or its status as a sovereign government is alone sufficient to allow taxation within Indian country. The *Merrion* Court relied on and approved of a long and enduring lineage of judicial precedent and other authorities (pre-dating *Montana v. United States*, 450 U.S. 544 (1981)) upholding broad powers of tribal taxation intended to raise revenue to fund government services.[4]

Just three years after it decided *Merrion*, this Court reiterated that tribes could tax non-Indians in order to raise revenues for tribal programs: "The power to tax members and non-Indians alike is surely an essential attribute of [tribal] self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985).

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[4] *See, e.g., Merrion*, 455 U.S. at 137 (citing *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824) for support that a tribe has sovereign authority to "control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."); *id.* at 139 (citing a Department of the Interior Solicitor's Opinion, Powers of Indian Tribes, 55 I.D. 14, 46 (1934) (from *Colville*, 447 U.S. at 153) for its recognition that a tribe's sovereign power to tax "may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions."); *id.* (citing 23 Op. Atty. Gen. 214 (1900); 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855) (from *Colville*, 447 U.S. at 152-53), for the Attorney General's repeated recognition of broad tribal authority, including taxation, over activities of non-Indians within a reservation); *id.* at 139-40 (quoting S. Rep. No. 698, 45th Cong., 3d Sess., 1-2 (1879) to demonstrate congressional acknowledgement of the validity of a tribal tax imposed on non-members by a tribe within its territory); *id.* at 141-42 (discussing *Morris v. Hitchcock*, 194 U.S. 384 (1904) to demonstrate approval of a revenue raising tax imposed on non-Indians); and *id.* at 141, 143-44 (discussing *Buster*, 135 F. 947, as confirmation that a tribe's authority to tax derives from its power to "raise revenues and pay for the costs of government.").

B. Under *Merrion*, A Tribe May Exercise Its Power To Tax In Accordance With General Principles Of Taxation Applicable To Other Government Entities

The *Merrion* Court relied on several landmark non-Indian tax cases to outline the circumstances under which a tribe's power to tax can be exercised:

> The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45 (1940). They benefit from the provision of police protection and other governmental services, as well as from "the advantages of a civilized society" that are assured by the existence of tribal government. *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.

Merrion, 455 U.S. at 137–38.

None of the cases cited by the Court were concerned with whether the taxing jurisdiction had exclusive or unrestricted regulatory power within its jurisdiction, or with whether the taxing jurisdiction retained any ownership interest in the property on which the taxable transaction occurred. Rather, these cases are representative of a body of jurisprudence establishing the "general principles of taxation" to which the Court referred in upholding a broad tribal right to tax. *Id.* at 140. These principles support the right of a tribal governmental body to tax activity or property within its

jurisdictional boundaries to fund the costs of its governmental programs.[5]

The Court in *Merrion* chose to apply the now routine nexus analysis contained in *Mobil Oil Corp. v. Commissioner of Texas,* 445 U.S. 425 (1980), and *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), in establishing the Tribe's right to tax: the taxpayer had nexus because it conducted business activity on the reservation. *Merrion,* 455 U.S. at 137. Similarly, the Court cited the observation in *Exxon Corp. v. Wisconsin Dept. of Revenue*, 477 U.S. 207, 228 (1980), another state nexus case, that the establishment of nexus entitles a jurisdiction to tax in order to raise the revenue to provide the "advantages of a civilized society" to the benefit of all who maintain situs or transact business within the jurisdiction.

The Court found the tribal tax in *Merrion* to be consistent with general principles of taxation.[6] It therefore found "nothing exceptional" in requiring non-members to pay taxes to the Tribe, which, along with the federal, state, and local governments, contributes to the establishment of a civilized society on the reservation. *Merrion,* 455 U.S. at 138.

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[5] Arguments that general principles of taxation do not necessarily apply to tribal governments because the party being taxed has no ability to participate in tribal government must be given no weight. First, as discussed above, this Court has already found applicable a broad tribal right to tax activity or property within tribal boundaries regardless of taxpayer representation in tribal government. Second, many tribal governments allow non-members to appear at hearings and other governmental proceedings to provide testimony or input. The Navajo Tax Commission, for example, held public hearings before recommending adoption of a hotel occupancy tax. J.A. 16-17. Finally, government entities regularly impose taxes on persons or entities who are not represented before them. By their nature, for example, hotel occupancy taxes like that at issue in this case are borne mainly by persons who do not reside within the jurisdiction levying the tax.

[6] *See also* the Court's reference to "settled principles of taxation." *Merrion,* 455 U.S. at 151.

C. Under *Merrion*, A Tribe's Power To Tax Non-Member Activity Is Not Dependent On Trust Status Of The Land On Which The Activity Occurs And Is Not Limited To Transactions With The Tribe Or Its Members

Merrion correctly makes no distinction between trust land and land owned in fee by non-members. To the contrary, the Court quoted and emphasized the language from *Buster v. Wright* stating that a government's powers are diminished neither "'by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.'" *Merrion*, 455 U.S. at 143 (quoting *Buster*, 135 F. at 952). Petitioner nonetheless argues that *Merrion* is not applicable because it involved trust land.

Trust status is relevant to governmental power only where the power derives, in whole or in part, from the power to exclude. Trust status is therefore relevant when a tribe attempts to exercise a *regulatory* power, but it is irrelevant when a tribe exercises the power to tax. Tribal power of taxation emanates from another source—a tribe's inherent power to govern and to raise the revenues necessary to cover the costs of government. It would indeed be a rare circumstance in which a non-tribal taxing jurisdiction had legal title to property subject to its taxing power, and of course no such requirement exists under general principles of taxation.

The taxpayers' leasehold interests in *Merrion* precluded the Tribe from excluding the lessees from the property. The ensuing argument—*i.e.*, that the power to tax is derived from the power to exclude and therefore cannot be exercised—was made and expressly rejected by the majority in *Merrion*. *Merrion*, 455 U.S. at 137.

Petitioner further attempts to distinguish *Merrion* by noting that the taxpayers' leases in *Merrion* were with the tribe. Petitioner cites *Washington v. Confederated Tribes of the*

Colville Indian Reservation, 447 U.S. 134 (1980), to support its argument that a tribe has the power to tax only those transactions that significantly involve a tribe or its members. *Pet. Brf.* at 12, 23–25. Although *Colville* states that a tribe's interest in raising revenues "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services," 447 U.S. at 156–57, it does not limit taxation to only those activities. In fact, *Colville* ruled that both the tribe and the state could tax the same transaction because both entities had a "legitimate governmental interest in raising revenues," even though in any given situation one entity's interest may be stronger than the other's. *Id.* at 157. *See also*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (recognizing the power of tribal, state, and federal government to simultaneously tax the same transaction).

A tribe thus has authority to tax non-members to raise revenue under *Merrion* regardless of whether the non-member is transacting business with the tribe or its members, and regardless of the type of land on which the non-member is situated.

II. THE *MONTANA* TEST DOES NOT APPLY TO NON-REGULATORY TRIBAL TAXATION

A. The *Montana* Test, Which Applies When Determining If A Tribe Can *Regulate* The Conduct Of Non-Members, Does Not Apply To Determining The Validity Of A Tribal Tax Designed To *Raise Revenue*

Montana v. United States addressed the validity of legislation enacted by the Crow Tribe that sought to prevent non-members from hunting or fishing on lands within the Tribe's reservation that were owned in fee simple by non-members. 450 U.S. 544 (1981). The State of Montana disputed the Tribe's legislation, asserting that the State had

sole authority to regulate hunting and fishing by non-members on such lands. The Court analyzed the various treaties leading to the establishment of the current Crow reservation in context with its interpretation of Congressional intent as reflected in subsequent legislation, particularly the allotment acts that lead to non-Indian land ownership on the reservation. *Id.* at 557–61. The Court interpreted the allotment acts as divesting the Tribe of sovereign power over non-members beyond that necessary to protect and control self-government and internal relations, because they indicated congressional intent not to subject non-Indians to tribal regulation. *Id.* at 560 n.9, 561. While acknowledging that Congress repudiated the allotment policy with the Indian Reorganization Act of 1934, the Court inferred no symmetric revesting of tribal authority over non-Indians because they retained the right to continue to reside and own property on the reservation. *Id.* at 560 n.9, 560-61. Because Congress had not restored the tribes' authority to exclude non-Indian settlers from the fee lands, the tribes did not regain the lesser derivative power to regulate non-members' conduct on their properties. *Id.* The Court further concluded that, due to tribes' status as dependent sovereigns, in general, "the inherent sovereign powers of an Indian tribe do not extend to the activities of the nonmembers of the tribe." *Id.* at 565.

The Court acknowledged, however, that "Indian tribes retain sovereign power to exercise some forms of civil jurisdiction over non-Indians, even on non-Indian fee lands." *Id.* In particular, the Court noted that a tribe "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *id.*, and a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.* at 566.

The Court has applied *Montana* and its exceptions on several occasions, but none of the cases in which it did so involved taxation. *South Dakota v. Bourland* involved tribal regulation of hunting and fishing by non-Indians within the reservation. 508 U.S. 679 (1993). The majority opinion reiterated the principle that a tribe's *regulatory* authority is derivative in large part of its power to exclude non-Indians from the reservation. *Id.* at 688-89. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* held that the Yakama Nation did not have power to zone non-member fee land in the area of the reservation open to the general public, but upheld the Nation's authority to zone non-Indian owned fee land in that part of the reservation closed to the general public. 492 U.S. 408, 424 (1989).

More recently, in *Strate v. A-1 Contractors*, the Court reemphasized that a tribe's presumptive authority to govern the conduct of a non-member emanates in large part from its practical legal capacity to exclude the non-member. 520 U.S. 438 (1997). *Strate* concerned a tort claim arising out of a traffic accident that involved non-Indians on a state highway within a federally granted right-of-way across the Fort Berthold Reservation. In holding that the Tribal Court lacked jurisdiction over the dispute, the Court characterized the right-of-way as equivalent to fee land for jurisdictional purposes under *Montana* because the Tribes could not exclude non-members. *Id.* at 456. Postulating that a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction with respect to non-members, the Court found it necessary to ascertain the scope of the Tribes' legislative authority. *Id.* at 453. The Court held that the Tribes had lost the inherent right to enact legislation governing usage of the highway when it lost the prerogative to exclude non-members from the right-of-way. *Id.* at 456. The Court concluded that because neither of the *Montana* exceptions was met, the Tribes necessarily lacked judicial jurisdiction over the claim. *Id.* at 456-59.

Montana and its progeny apply the general rule that a tribe has regulatory authority over non-Indians only where the tribe retains the power to exclude non-Indians from the land, unless one of the two *Montana* exceptions applies. The Court's reference to taxation in its articulation of the "consensual relationship" exception has been misunderstood, leading to the erroneous belief that taxation of non-Indians on fee land is generally subject to the *Montana* test. *Montana* and its progeny, however, are not tax cases—they are cases that address regulatory authority: [7] *Montana* and *Bourland* involved hunting and fishing rights; *Brendale* involved zoning; and *Strate* involved adjudicatory authority. These cases concerned tribal efforts to control or regulate *activities* or *conduct* and involved real or potential conflict between tribal and non-tribal jurisdictions.

Merrion—and not *Montana*—provides the analytic framework for determining the validity of non-regulatory tribal taxation of non-members, whether on trust land, fee land, or fee-equivalent land. This conclusion is inescapable when *Colville*, *Montana*, and *Merrion*—all decided within a 20-month period—are read together. *Colville* held that taxing schemes that merely intend to raise revenue are not regulatory in nature and therefore do not normally give rise to concerns regarding state or tribal regulatory jurisdiction. 447 U.S. 134. *Montana* prescribed the conditions under which tribes have authority to regulate non-members and parenthetically noted that taxation can have regulatory intent. 450 U.S. at 565-66. *Merrion*, the last of the three, pointed out that governments, including tribes, generally possess a broad authority to impose taxes intended to raise revenue to fund services that contribute to a civilized society throughout the jurisdiction.

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[7] The *Montana* Court itself stated, "[T]hough the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us in this case is a narrow one." *Montana*, 450 U.S. at 557.

455 U.S. at 140. The Court put its final imprint on this analysis in *Cotton Petroleum Corp. v. New Mexico* by allowing multiple taxation (state, tribal, and federal) of the same activity. 490 U.S. 163 (1989). The three governments had varying degrees of civil authority throughout the reservation and all provided services contributing to a civilized society. *Id.*

Taxation can be regulatory in nature, *see infra* at 18-23, but in its more common form a tax is simply a means of raising revenue to pay for the cost of government. The Court has long recognized the distinction between *regulatory* taxation and *revenue—raising* taxation. Indeed, it made just such a distinction in a case involving tribal taxation only ten months prior to its decision in *Montana*. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Moreover, the problems of compliance that may arise when a regulated party must comply with regulations imposed by multiple jurisdictions do not present themselves in the context of multiple taxation. *See id.* at 154-59. *Montana* and its exceptions would thus apply to a tribe's power to tax non-members on fee lands (or on fee-equivalent lands under *Strate*) *only* if the tax is designed to "regulate . . . the activities of nonmembers . . . ." 450 U.S. at 565. The validity of a tribal tax designed to raise revenue is accordingly subject to a different standard analysis—that set forth in *Merrion*.

B. The Court Has Repeatedly Distinguished Between Taxation That Is *Regulatory* In Nature And Taxation That Has Only A *Revenue-Raising* Purpose, And Has Specifically Made This Distinction In The Context Of Tribal Taxation

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, which was handed down only ten months prior to *Montana*, the Court upheld the Tribes' transaction tax on tobacco sales the legal incidence of which fell primarily on

non-Indians. 447 U.S. 134 (1980). The transactions occurred in retail outlets located on trust land. The Court held that the power to tax non-Indians was not inconsistent with the Tribes' dependent status and had not been preempted by Congressional legislation or state taxes on the same tax base. *Id.* at 156.

The Court also upheld the State of Washington's concurrent tax on non-member purchases even though the transactions occurred on trust land, holding that both governments possessed a legitimate interest in raising revenue to fund services. *Id.* at 157. The Court rejected the Tribes' assertions that Washington's tax "regulated" the sale of cigarettes, and that because the activity in question was conducted on trust land where the Tribes possessed presumptive civil regulatory authority, the State's tax was impermissible:

> A second asserted ground for the invalidity of the state taxes is that they somehow conflict with the Tribes' cigarette ordinances and thereby are subject to pre-emption or contravene the principle of tribal self-government. This argument need not detain us. There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. *Although taxes can be used for distributive or regulatory purposes, as well for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases* . . . . Other provisions of the tribal ordinances do comprehensively regulate the marketing of cigarettes by the tribal enterprises; but *the State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers*. Hence, we perceive no conflict between state and tribal law warranting invalidation of the State's taxes.

Id. at 158-59 (emphasis added).

More recently, in *Jefferson County v. Acker*, the Court reaffirmed the distinction between revenue raising taxes and taxes used to accomplish regulatory goals. 527 U.S. 423 (1999). Jefferson County had imposed a broad occupational tax that extended to federal judges. The taxpayer judges contended that the tax represented an impermissible attempt by the county to regulate the federal judiciary, a power reserved solely for the federal government. The Court disagreed: "In practice, Jefferson County's license tax serves a revenue-raising, not a regulatory, purpose. Jefferson County neither issues licenses to taxpayers, nor in any way regulates them in their performance of their duties based on their status as license taxpayers." *Id.* at 440.

Because the tax did not regulate, and served only to raise revenues, it was upheld. *See also Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286 (1976) (county *ad valorem* tax imposed upon imported goods held to "have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce"); *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 1995 U.S. App. LEXIS 24517 at *9-*10 (10th Cir. 1995) (finding that the state's tax on beer sold in Indian country was within its power to regulate sales of alcoholic beverages within Indian country: "Where the taxation is an integral part of the overall regulatory structure in a traditionally heavily regulated area, as opposed to a simple revenue measure, the tax may properly be considered to be regulatory and to fall within the regulatory authority." *Citing Colville*, 447 U.S. 134 at 158), *on remand from* 515 U.S. 450 (1995).[8]

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[8] Similarly, the Court has struck down taxes imposed by the United States Congress where the tax was designed not to raise revenue but to regulate in an area in which the Constitution has left regulation to the States. *See United States v. Kahriger*, 345 U.S. 22, 31 (1953) ("Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this

The courts have also made a distinction between regulatory taxes and revenue-raising taxes for purposes of the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits federal courts from enjoining the assessment, levy or collection of any state tax where a plain, speedy and efficient remedy is available in state court to the party contesting the tax. "These cases make a general distinction between broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory scheme. Taxes fall within the scope of the Tax Injunction Act, but regulatory fees do not." *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997). *See also Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1312 (10th Cir. 1999) (finding that a state assessment for disabled parking placards constitutes a regulatory fee because it is tied to the administrative costs of a specific regulatory scheme); *Hager v. City of W. Peoria*, 84 F.3d 865, 871 (7th Cir. 1996) (municipal ordinances requiring permits for trucks exceeding certain weight limit were regulations rather than taxes, even

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Court to declare the enactments invalid.") (footnote omitted), *overruled on other grounds, Marchetti v. United States*, 390 U.S. 39, 58 (1968). *See also United States v. Butler*, 297 U.S. 1, 59, 67-69 (1936) (holding beyond the taxing power an act taxing the processing of agricultural commodities and providing for payments to farmers from the taxes collected); *Hill v. Wallace*, 259 U.S. 20, 37 (1922) (striking down an act imposing a tax on the employment of child labor as a regulation beyond Congress's power). Although these cases are of less relevance today under the expansive modern interpretation of the commerce clause, *see, e.g., United States v. Darby*, 312 U.S. 100 (1941) (upholding congressional regulation of child labor under the commerce clause), they indicate that, in proper circumstances, the Court will inquire as to whether a regulatory tax is within the power of Congress. *See South Carolina v. Baker*, 485 U.S. 505, 527 n.16 (1988) ("Because we hold that Congress could have prohibited States from issuing any unregistered bonds by direct regulation, we necessarily reject South Carolina's argument that [26 U.S.C.] § 310(b)(1) is an impermissible regulatory tax because it imposes a tax on activities not subject to federal regulatory power.").

though the revenues from the assessments went into the general fund, because they "were passed to control certain activities, not to raise revenues").

The difference between a non-regulatory, revenue-raising tax and a tax employed as a part of a regulatory scheme is critical. Regulatory taxation differs from the usual revenue-raising tax in two key respects. First, unlike a regulatory tax, which is designed to regulate conduct, *e.g.*, *Hill v. Wallace*, 259 U.S. 20, 37 (1922) (tax designed to regulate child labor); *Hager v. City of W. Peoria*, 84 F.3d 865, 871 (7th Cir. 1996) (tax designed to regulate use of roads by large trucks), non-regulatory taxation does not attempt to proscribe behavior. Generally, taxes are enacted to raise revenue to fund government services. Although a regulatory tax may raise revenues for general governmental programs, it is not imposed for that purpose, but for its regulatory purpose. In fact, a completely effective regulatory tax may raise no revenue as it eliminates the conduct taxed. A revenue-raising tax, in contrast, is generally enacted with the hope that it will have a minimal effect on the activity taxed. The Navajo Hotel Occupancy Tax at issue for example, is not intended to deter guests from staying at hotels on the Navajo Reservation, because that would frustrate its purpose of raising revenue.

Second, taxing power may be, and commonly is, simultaneously exercised by overlapping jurisdictions, each providing complementary services to the direct or indirect benefit of all those with nexus to the jurisdiction. This simultaneous existence and exercise of taxing power by overlapping jurisdictions is the rule rather than the exception in the tax area, and does not present conflicting jurisdictional claims such as those that the Court was called on to resolve in regulatory contexts such as *Montana* and its progeny. The Court specifically addressed this issue in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). After *Merrion* upheld the Jicarilla Apache's right to impose severance taxes

on non-members, an affected non-member taxpayer, Cotton Petroleum Company, challenged the State of New Mexico's severance tax on that same activity, arguing that the levy was invalid because the tax far exceeded the value of the State's on-reservation services and that it represented impermissible double taxation. The Tribe, in its *amicus* brief, contended that the State's tax illegally thwarted its own ability to raise taxes and diminished the value of its oil and gas leases. As it had in *Colville*, 447 U.S. at 156-57, the Court upheld the simultaneous exercise of state and tribal taxing jurisdiction: "There are, therefore, three different governmental entities [federal, state, and tribal], each of which has taxing jurisdiction over the non-Indian wells . . . . Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over all Cotton's leases." *Cotton Petroleum Corp.*, 490 U.S. at 188-89.

Common examples of multiple taxation by overlapping jurisdictions are familiar to most of us. "Concurrent federal and state taxation of income, of course, is a well-established norm." *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 448 (1980). Moreover, in the realm of property taxation, numerous jurisdictions levy on the same property. Commonly a city, county, school district, hospital district, etc., each with its own separate governmental responsibilities to fund, will levy separate taxes on the same property. In sum, the power to tax need not be, and indeed rarely is, an exclusive one.

III. UNDER *MERRION*, THE NAVAJO HOTEL OCCUPANCY TAX IS A VALID NON-REGULATORY TAX LEVIED FOR THE PURPOSE OF RAISING REVENUES TO PAY FOR THE COST OF LEGITIMATE GOVERNMENT SERVICES

The District Court of New Mexico upheld the Navajo Hotel Occupancy Tax by applying *Montana's* consensual relationship test to tribal powers of taxation and by also applying the "benefits of civilized society" standards from *Merrion*. Pet. App. 63a. In deciding that *Montana* was applicable, the District Court noted that both *Montana* and *Strate* specifically mention that "a tribe may regulate, through taxation . . . . The Supreme Court's inclusion of taxation power within its discussion of the consensual relationships test indicates that the test applies to [the taxation] form of tribal jurisdiction as well as to tribal regulatory and judicial authority over non-members." *Id.* At the same time, the District Court recognized that *Merrion* is not limited to cases involving Indian trust lands and that "fairness indicates that [a tribe] be allowed to impose taxes to help pay for [governmental] services." *Id.*

In a majority decision, the Tenth Circuit also upheld the Navajo Hotel Occupancy Tax, ruling that (1) the *Montana* test was controlling, Pet. App. 9a, (2) the fee status of the land did not in and of itself preclude tribal taxation, *id.* at 25a, (3) a "balancing test" derived from *Merrion* was an appropriate elaboration of the *Montana* consensual relationship exception in the area of taxation, and *id.* at 13a-14a, (4) the tax fell within the consensual relationship exception. *Id. at 28a-30a.* Unlike the District Court, the Tenth Circuit never explained why it thought that *Montana* should apply as part of its analysis.

Despite looking to *Montana*, the Tenth Circuit nonetheless emphasized that the tax was in substance and purpose similar to state and local occupancy taxes consistently upheld by the

courts: "We conclude that the same principles apply as in those other cases in which hotel occupancy taxes have been subject to judicial review." *Id.* at 30a. The court further recognized that taxation by its nature is less burdensome than the exercise of other forms of tribal authority over non-members and that the burden of the Navajo tax was "minimal" and did not materially restrict non-members' activities. *Id.* at 30a-31a. In its balancing test, the Tenth Circuit held that the burden of the tax was not disproportionate to the services provided and therefore the Navajo Hotel Occupancy Tax was valid. *Id.* at 31a-32a.

Amici agree with the lower courts that ***if*** *Montana* is the applicable rule, then the tax should be upheld under the "consensual relationship" exception. The *Montana* test simply does not apply, however, because the Navajo Hotel Occupancy Tax is not a regulatory tax. The courts below failed to distinguish between regulatory taxation and revenue-raising taxation. Cognizant that *Montana*'s consensual relationship exception referred to "taxation," the Tenth Circuit, like the District Court, concluded that it should somehow incorporate the *Montana* test in its analysis. Because the court also recognized that *Merrion* applies beyond trust property, it attempted to reconcile *Montana* and *Merrion* by extracting a "balancing test" from *Merrion* and grafting it onto *Montana*'s "consensual relationship" exception. As a practical matter, the court's balancing test between taxes and services on a case by case, taxpayer by taxpayer basis would impose a burden on tribes that no other governmental body is required to carry in order to validate its tax system and would be difficult for the courts to apply. Moreover, had the Tenth Circuit distinguished between regulatory and revenue-raising taxation, it would not have needed to apply such a balancing test nor fit the tax within the *Montana* exception. Instead, the tax would simply have been evaluated under "general principles of taxation" as prescribed by *Merrion*.

This Court has recognized the need to distinguish between regulatory taxation and revenue raising taxation. In *Colville*, handed down less than a year prior to *Montana*, and more recently in the *Jefferson County* case, the Court has made the distinction between regulation and taxation for revenue purposes in both a tribal and a non-tribal context. *Colville*, 447 U.S. 134 (1980); *Jefferson County v. Acker*, 527 U.S. 423 (1999). *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Clarification of the distinction here, along with the corresponding reaffirmation of the "general principles of taxation" prescribed by *Merrion*, will bring clarity and certainty to an area in great need of both.[9]

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[9] The United States Court of Appeals for the Ninth Circuit has held on two occasions that *Merrion* and not *Montana* governs the validity of tribal taxes on fee lands within reservation boundaries. *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *rehearing denied, opinion amended*, 2000 U.S. App. LEXIS 92, *cert. denied*, 120 S. Ct. 1964 (2000). In *Red Wolf*, the Ninth Circuit reaffirmed its earlier holding in *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), that the tribe could tax a railroad right-of-way, even as it held that the tribe could not adjudicate a tort claim arising within the same right-of-way, which the court considered to be the equivalent of fee lands for jurisdictional purposes under *Strate*. The *Red Wolf* panel, which included retired Justice White (who participated in the *Merrion* and *Montana* decisions), reconciled its decisions as follows:

> [T]he Tribe's power to tax the right-of-way does not create civil jurisdiction over non-members arising out of accidents occurring on the right-of-way. *The power to tax is not equivalent to the right to exercise civil jurisdiction over tribal land.* Indeed, *Merrion* rejected the theory that a tribe's taxation power was coextensive with its right to exclude non-members from tribal lands. Thus, because *a tribe's taxation power is broader than its civil adjudicatory authority over non-members*, the Tribe's authority to tax the right-of-way is not dispositive.

Red Wolf, 196 F.3d at 1063-64 (opinion joined in by retired Justice White) (omitting footnote) (emphasis added). [Footnote continues on next page.]

The Navajo Hotel Occupancy Tax (H.O.T.) at issue is a revenue raising tax—it is not a regulatory tax designed to curb or eliminate hotel stays or other business of the petitioner. The H.O.T. imposes an 8% tax on all hotel rooms located within the reservation, whether on fee land or trust land. J.A. 15-17; Pet. App. 67a. As the Tenth Circuit noted, this tax is like similar hotel taxes imposed by the states of Arizona and New Mexico. Pet. App. 28a-29a. Such tax is for revenue raising purposes to cover the cost of governmental services provided or available to the public, including Petitioner and its hotel guests.[10]

Most recently, however, in *Big Horn County Electric Cooperative v. Adams*, the Ninth Circuit held that the Crow Tribe exceeded its regulatory authority when it assessed a 3% tax on the value of the taxpayer's rights-of-way over the reservation through which the taxpayer ran its transmission lines. 219 F.3d 944 (9th Cir. 2000). The Ninth Circuit held (erroneously) that the taxpayer's rights-of-way were equivalent to fee land and that *Montana* applied. *See id.* at 953 (overruling *Burlington Northern R.R. Co. v Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991)). In so ruling, the panel relied on the decision in *Red Wolf*, 196 F.3d 1059, but ignored the distinction that the *Red Wolf* panel made between regulatory or adjudicatory powers on one hand and taxation on the other.

[10] For example, the federal and state highways over which Petitioner's guests travel to reach the hotel property are jointly patrolled by the Arizona state and Navajo tribal police. Pet. App. 57a. The tribal police force is the primary provider of police protection. *Id.* A Navajo police department substation is located in Cameron, and a 911 emergency call from Atkinson would be forwarded to the Navajo police. *Id.* The Navajo fire department and the Bureau of Indian Affairs fire department, both located 25 miles away in Tuba City, provide the primary response to calls from the Cameron area. *Id.* at 57a-58a; J.A. 86-89, 91. The Navajo Nation's Emergency Medical Service Department provides emergency medical care to the Cameron area. Pet. App. 58a. *See also* Pet. App. 27a-28a n.13. Additionally, the Navajo Nation provides health services to both members and non-members through the Navajo Nation Division of Health, including health inspections of all food vendors located on the reservation. Pet. App. 87a. The Navajo Nation's Tourism Department provides facilities for the health and safety of visiting tourists. *Id.* The

The Navajo H.O.T. has no regulatory purpose whatsoever. The Tribe does not tell Petitioner whom it may let its rooms to, what it may charge for those rooms, or in any other way direct Petitioner's conduct of its business.[11] Nor does it regulate in any way the hotel guests who are subject to the tax. Because the Navajo tax has a revenue-raising purpose meant to defray the costs of government services, it must not be analyzed under the *Montana* framework, which addresses tribes' regulatory power over non-members on fee lands. Rather, the proper analysis of the Navajo H.O.T. takes place under the standards set forth in *Merrion* and general principles of taxation referred to in *Merrion*.

There is nothing extraordinary about requiring a business or, as here, its customer, to contribute through taxes to the general cost of government if its economic activities or contacts with the taxing jurisdiction establish a nexus.

Navajo Nation also funds economic and community development, social services, educational programs, and a host of other activities. *Id.*; J.A. 107-110.

[11] Petitioner, on page 22 of its brief, suggests that the enforcement mechanisms of the Navajo tax (i.e., record-keeping requirements, lien creation procedures, etc.) constitute regulation even if the tax itself does not. The Court has consistently rejected the argument that a lawful tax should be struck down because it imposes minimal regulatory burdens. As explained in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Court held in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976), "Indian retailers on an Indian reservation may be required to collect all state taxes applicable to sales to non-Indians. We determined that requiring the tribal seller to collect these taxes was a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes." 498 U.S. 505, 512 (1991). Four years later, in *Colville*, the Court reiterated that "the state may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing the tax [on sales to non-Indians]," and that those burdens cannot be used to invalidate an otherwise valid tax. 447 U.S. at 151. *See also, Department of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 75 (1994).

Merrion, 455 U.S. at 138. Atkinson owns property on the reservation, employs 120 people and conducts an active business. Its guests are visitors to the reservation, and enjoy the benefits of tribal government and tribal services. Under "general principles of taxation" there is simply no question that there is a nexus sufficient to support the taxation. Furthermore, the services made available by the Tribe provide equally compelling support for taxation. *See id.* at 138 n.5 ("We agree with [Circuit Court] Judge McKay's observation that '[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes'") (quoting *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 550 (10th Cir. 1980) (McKay, J. concurring)). *See also Merrion*, 455 U.S. at 137. The revenues raised by the Navajo Nation are used to support the public good. Petitioner's business and guests benefit from a safe and healthy environment made possible by the government services provided by the Navajo Tribe.

To suggest that there must be a more direct benefit for the disputed tax to be valid flies in the face of a long line of case precedent. As the Court noted in *Cotton Petroleum Corp. v. New Mexico*: "[T]here is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations." 490 U.S. 163, 189-190 (1989).

Under the principles set forth in *Merrion*, general principles of taxation are applicable to a tribal revenue-raising tax just as they would be to a tax imposed by any other governmental entity. Under such principles, the petitioner's attempt to avoid the Navajo H.O.T. must fail and the tax must be upheld. Like the lessee in *Merrion*, Petitioner and its hotel

guests that are subject to the Navajo H.O.T. "benefit from the provision of police protection and other governmental services, as well as from the 'advantages of a civilized society' that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-38 (quoting *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980)).

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

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